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In The

Supreme Court of the United States

October Term, 1992

BLUE JEANS EQUITIES WEST, A Joint Venture,

Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
A Municipal Corporation,

Respondent.

Petition For Writ Of Certiorari To The California Court Of Appeal

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent City and County of San Francisco (the "City") files this brief in opposition to the Petition for Writ of Certiorari filed by appellant Blue Jeans Equities West ("BJEW") and prays that the Writ be denied. The California Court of Appeal, First Appellate District, Division Three, correctly affirmed the City's right to impose

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NOTE: For consistency, we use the citation format suggested by Appellant. Footnotes are omitted and emphasis is ours unless otherwise stated in all quoted material. With respect to the record before the California Court of Appeal, "RT" refers to the Reporter's Transcript, and "AA" refers to the Appellant's Appendix. We refer to trial exhibits by exhibit number. The trial exhibits are attached to the Appellant's Appendix.

its Transit Impact Development Fee ("TIDF") on BJEW as a condition of developing a large office building complex in San Francisco known as Levi's Plaza.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeal has affirmed the right of the City to collect the TIDF from BJEW. Payment of the TIDF fulfills a transit mitigation condition the City imposed on BJEW when it obtained approval to develop Levi's Plaza. Like the two office projects at issue in *Russ Bldg. Partnership v. City and County of San Francisco*, 44 Cal.3d 839, 854-55, 244 Cal.Rptr. 682, 750 P.2d 324, *appeal dismissed sub nom. Crocker National Bank v. City and County of San Francisco*, 488 U.S. 881 (1988) ("*Russ Bldg. II*"), (1) the Levi's Plaza project had been approved prior to passage of the Ordinance authorizing the TIDF; and (2) the approval was conditioned on the developer's commitment to pay for the increased costs of public transit generated by its project.

BJEW takes issue with the Court of Appeal's determination not to apply the so-called "heightened scrutiny" nexus test of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), to the TIDF.[1] Despite the fact that the

[1] Many courts and commentators have disagreed that *Nollan* requires a heightened level of scrutiny. *See, e.g., Commercial Builders of Northern California v. Sacramento*, 941 F.2d 872, 874-75 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1997 (1992), and cases cited therein ("*Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly

Ordinance and its underlying assumptions have been upheld (*Russ Bldg. Partnership v. City and County of San Francisco*, 199 Cal.App.3d 1496, 246 Cal.Rptr. 21 (1987) ("*Russ Bldg. I*"), reprinted as directed by the California Supreme Court in *Russ Bldg. II*, *supra*, 44 Cal.3d at 854-55), BJEW contends that *Nollan* requires the City to demonstrate a precise connection between the amount of the TIDF and the *individual* transit burden caused by Levi's Plaza.

The Court of Appeal correctly interpreted *Nollan* to apply to cases involving "possessory takings." The decision is consistent with this Court's unanimous holding in *United States v. Sperry Corp.*, 493 U.S. 52, 60, 62 n.9 (1989), that a statutory user fee was not a "physical appropriation of property" and need only approximate the cost of benefits supplied to withstand a takings challenge. The Court of Appeal also correctly relied on the Ninth Circuit's decision in *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1997 (1992), which upheld an ordinance imposing a low-income housing fee on new non-commercial development.

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responsible for the social ill in question."). Based on decisions applying *Nollan*, commentators have identified three possible meanings of the *Nollan* nexus test: *Nollan* as a heightened scrutiny test, as a narrow holding, and as a balancing test. *See* Lemon, Feinland, Deihl, *The First Applications of the Nollan Nexus Test: Observations and Comments*, 13 Harv. Envtl. L. Rev. 585, 589-95 (1989).

More fundamentally, *Nollan* does not require that the City demonstrate that the TIDF be tailored with "mathematical nicety" to each individual project subject to the Ordinance. The Constitution does not require developer's exactions and other police power regulatory fees imposed by legislation to be tailored to each entity subject to the fee. However, the evidence in the record of the significant impact Levi's Plaza posed to public transit (as described in its Environmental Impact Report) would pass muster under established economic regulatory takings analysis. *See, e.g,* Exh. 1, AA, pp. 148-49.[2]

STATEMENT OF THE CASE

The City submits this Statement of the Case to provide the Court with a more complete background of the TIDF Ordinance and related litigation, and to correct various misstatements in Petitioner's Statement.

A. The TIDF Ordinance

The TIDF Ordinance was a legislative solution to a problem that had been escalating for years prior to passage of the Ordinance. Office construction in the downtown area of San Francisco had proliferated, placing

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[2] In this regard, the City takes issue with the third question presented for review. The question assumes that the TIDF does not alleviate impacts on public transit posed by Levi's Plaza at the time it was approved. As will be explained in the Statement of the Case, *infra*, findings by the trial court, based on substantial evidence at trial, contradict such an assumption.

increasing demands on an already overburdened public transit system. Faced with the need to expand transit capacity to provide service to and from the area for the additional employees generated by development of new office buildings, the City enacted the TIDF Ordinance in May 1981 (S.F. Admin. Code §§ 38.1 *et seq.*; Exh. 5, 6).

The TIDF Ordinance entitles the City to recover from the developers of new office space in the "downtown area" of San Francisco a portion of the City's incremental cost of expanding and operating public transit to meet the demand created by the new office development. Exh. 5, §§ 38.2, 38.3.[3] The Ordinance limits the developer's monetary contribution to $5.00 per square foot of new office space. Exh. 5, § 38.6.[4] The TIDF Ordinance states its purpose in relevant part as follows:

> It is the purpose of this ordinance to require developers of new development in the downtown area to pay a fee *which is related directly to the incremental financial burden imposed on the Municipal Railway*. . . .
>
> . . . This fee is intended to recover all costs incurred by the Municipal Railway in meeting peak-period public transit service demands created by office uses in each new development

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[3] The parties stipulated that the "downtown area," as defined in Section 38.1(d) of the Ordinance, includes the area of San Francisco where Levi's Plaza is located. AA 28: 7-8. *See also* map of TIDF area. Exh. 23 (Appendix A hereto).

[4] As the court noted in *Russ Bldg. I, supra*, 199 Cal.App.3d at 1503 n.2, the actual adjusted estimates of increased transit costs attributable to new riders ranged from $6.57 to $8.36 per square foot (the trial court in that case relied on the latter figure).

> subject to the fee, including the expansion of service capacity through the purchase of rolling stock, the installation of new lines, the addition to existing lines and the long term operation, maintenance, repair and replacement of those expanded facilities.

Exh. 5, § 38.3.[5]

In *Russ Bldg. I, supra*, the California Court of Appeal upheld the constitutionality of the TIDF Ordinance. The Court rejected claims that the TIDF was a "special tax" under Article XIII A, section 4 of the California Constitution, and that it violated federal and state equal protection and substantive due process guarantees.

The City's transit planners had grappled with the problem of increasing demand on existing public transit facilities long before settling on the TIDF as the proper funding mechanism to alleviate the problem. The City determined that until such a funding mechanism was adopted, developers should be put on notice that they might be required to contribute to the expansion of transit service to accommodate the increased ridership that their developments would generate. In anticipation of the City's enacting some form of transit funding mechanism,

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[5] BJEW makes references in its factual statement to the City's "transit first" policy. Pet. at 7. The TIDF Ordinance, however, makes no mention of the "transit first" policy in its findings (Exh. 5, § 38.2), or in any other section of the Ordinance. Furthermore, the Transportation Element of the City Master Plan (cited in Pet. at n.15) is not part of the record in this case. Such discussion is therefore gratuitous and should be disregarded.

the City's Planning Commission approved certain building permits on the condition that the developer agree to participate in a funding mechanism if enacted. Exh. 2, 7-20. Levi's Plaza was the first of such developments. *Id.*

The California Supreme Court declined to review the portion of the Court of Appeal decision in *Russ Bldg. I* upholding the TIDF Ordinance on its face. Instead, in *Russ Bldg. II*, the Court addressed the applicability of the Ordinance to two other office projects that had been approved prior to and were under construction at the time the Ordinance was enacted. The Planning Commission resolutions approving those projects contained transit mitigation conditions that the Court found comparable to the transit mitigation condition contained in the resolution approving Levi's Plaza. 44 Cal.3d at 844, n.2.[6] The Court upheld the application of the Ordinance to the two projects, determining that the transit mitigation conditions sufficiently put the developers on notice of their obligation to contribute to public transit by such a mechanism as the TIDF. *Id.* at 846-53. The Court concluded that imposition of the TIDF did not impair the developers' vested rights. *Id.* at 853-54.[7]

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[6] BJEW's statement that the language in the respective conditions "differs substantially" (Pet. at 8, n.18) contravenes the *Russ Bldg. II* finding. Indeed, the Court of Appeal below commented that "our Supreme Court found the [respective] conditions ***substantially similar***." Pet. at A-8.

[7] Plaintiffs in *Russ Bldg. II* also asked the Court to consider the applicability of this Court's decision in *Nollan, supra*, to the TIDF. The California Supreme Court declined to do so. 44 Cal.3d at 845, n.6.

B. Levi's Plaza

The facts in this case parallel the facts in *Russ Bldg. II*. In both cases, the respective projects were approved substantially before passage of the TIDF Ordinance. Likewise, at the time the projects were approved, the City did not know what type of funding mechanism, if any, would be imposed to deal with the burden on the City's public transit system resulting from the new office construction. *See* Green testimony excerpted at 44 Cal.3d at 851-52. It was certain, however, that (1) mushrooming office construction would significantly increase the need for enhanced public transit; (2) the transit system could not accommodate the new patrons the office buildings would generate; and (3) the City did not have the funds to pay for the necessary expansion and operation of increased capacity to accommodate the new riders. Levi's Plaza is only unique in that it was the first of the pre-TIDF Ordinance projects upon which a transit mitigation condition was imposed.

BJEW premises its petition on the erroneous notion that the City did not adequately define the problem associated with the impact of Levi's Plaza on public transit.[8] On the contrary, as noted by the Court of Appeal, the Levi's Plaza Environmental Impact Report ("EIR"), certified on December 14, 1978, specifically described the

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[8] For example, BJEW mischaracterizes the City's recognition of the impact of new development on transit service as only a "possible" linkage. Pet. at 5. BJEW also erroneously claims that the EIR showed merely that Levi's Plaza *might* impose a burden on public transit. Pet. at 6.

burden on public transit posed by the development. Pet. at A-2 & n.1. The EIR also suggested mitigation measures to alleviate such impacts and emphasized that lack of funds prevented implementation of the mitigation measures. Exh. 1, AA, pp. 148-49.

Levi Strauss & Co. was to be BJEW's primary tenant in the new complex. The EIR pointed out that Levi's employees arriving on other transportation lines would have to transfer to City buses to get to Levi's Plaza. The EIR concluded that the City would have to operate *16 additional bus runs* during peak periods to serve this increased demand. Exh. 1, AA, p. 148. In order to mitigate this impact, the EIR suggested that the headways (*i.e.*, the time between buses) on the affected routes would have to be reduced to about 3 to 5 minutes during peak hours. The EIR noted that "*[n]o funds are available* for equipment and staff necessary for implementation of such mitigation measures. AA, pp. 148-49. Thus, the EIR precisely identified the problem: *paying to provide capacity to accommodate the increased transit service demand caused by the development. See also* RT 129:28-130:12.[9]

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[9] The record below also demonstrates that BJEW was both aware of the problem and committed to solving it. At the Planning Commission hearing on January 4, 1979, BJEW partner Gerson Bakar assured the Commission that "[i]f an equitable device is brought forth, and we understand that device is not available today, we as developers and along with our neighbors that would partake in that . . . would become a party to it." Exh. 25, AA 258:17-22. Mr. Bakar's testimony responded to concerns from neighbors that there should be a commitment from the developer to fund the increased transit necessary to serve the project. Exh. 25, AA 254-55.

The Planning Commission approved the project on January 4, 1979, pursuant to Resolution No. 8142. AA 26:25-27:10; Exh. 2. The resolution contained the following transit mitigation condition that responded to the adverse environmental impacts on transportation described in the EIR, as well as to the public testimony at the hearing ("Condition 5(c)"):

> The owner of the project shall make a good-faith effort to participate in future funding mechanisms to assure adequate transit service to the area of the city in which the project is located.

In further recognition of the potential long-range impact of new commercial development in the downtown area on public transit, and in anticipation of the TIDF Ordinance, which was then pending before the San Francisco Board of Supervisors, the City Planning Commission passed Resolution No. 8543 on March 27, 1980 (Exh. 4). That resolution endorsed the concept of a transit fee "on new non-residential commercial structures in the downtown area to help defray the additional costs of public transit resulting from the occupancy of the new structures." The resolution referred to six recent EIR's which included transit mitigation measures. The resolution also referred to seven recent developments approved by the Commission in which the developer agreed to participate in a "fair and appropriate mechanism to provide funds for maintaining and augmenting mass transit services, should such a mechanism be established by the

City." Levi's Plaza was the first of these developments. Exh. 22.[10]

On May 5, 1981, the City adopted the TIDF Ordinance. BJEW did not receive its Certificate of Final Completion and Occupancy on the project until 1987. AA 27:25-28:3, 28:16-20. The completed project includes 620,481.95 square feet of additional office use in five buildings in the complex. AA 28:11-15. After filing this action, BJEW paid its TIDF in the amount of $3,102,409.75. The City has placed the money in trust pending the outcome of the case. AA 28:16-20.

In its Statement of Decision, the trial court disputed the applicability of *Nollan* to the case at bar (AA 122:11-24) because the exaction is a payment of money, not a physical occupation of real property. Nevertheless, the court found a sufficient nexus under *Nollan* between imposition of the TIDF on Levi's Plaza and the City's objective of mitigating the transit impact generated by the project. AA 122:25-26, 123:1-3. The trial court also found that the language of Condition 5(c) contemplated an obligation on the part of the developer to fund public transit through a mechanism such as the TIDF. AA 119:24-25, 120:1-2.

The Court of Appeal affirmed the trial court's decision. The Court concluded that any heightened scrutiny test in *Nollan* is applicable only to possessory takings

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[10] The California Supreme Court discussed Resolution No. 8543 at some length in *Russ Bldg. II*. 44 Cal.3d at 852-53. The Court found the resolution supportive of its conclusion that "the TIDF is within the range of mechanisms contemplated by the transit mitigation conditions." *Id*. at 853.

cases. Pet. at A-4 – A-7. The Court also agreed with the trial court that Condition 5(c) contemplated payment of the TIDF and imposed a mandatory requirement on BJEW. *Id.* at A-7. The Court further found that BJEW's commitment to fund increased transit "to the area of the city in which the project is located" conformed with the express purposes of the TIDF Ordinance and thus was substantially similar to the *Russ Bldg. II* conditions. *Id.* at A-7 – A-9.[11] The Court concluded that BJEW "had notice

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[11] BJEW has argued throughout this litigation that the transit problem posed by Levi's Plaza derived from its location outside the heart of the financial core, rather than from the construction of new office space. *See* Pet. at 20. The evidence in this case, however, is to the contrary. The City's *method* of addressing the transit impacts generated by Levi's Plaza may have been affected by the location of the development, but the *overall transit problem* posed by Levi's or by new office development in the financial district of the City *was the same*: there were no funds to pay for the increased demand on public transit generated by the new developments. RT 129:28-130:12. For example, former Planning Director Rai Okamoto testified as follows:

> [I]t had become apparent I think at the time that there would be expected a *change in the character of land use* in [the Northern Waterfront area] *which might increase the need for improved transit, in this case office development*, which is generally more as they say labor intensive than some [of] the previous uses had been. So there was concern about how people would move in and out of that area by transit.

RT 101:28-102:6.

It is manifest that increased demands on an overburdened system pose the same problem even if the site of a particular demand has not been developed as intensely as another site. Thus, the "downtown area" as defined in Section 38.1(d) of the Ordinance includes not only the City's financial district, but a much broader area of the City that the legislators anticipated

that its development would adversely impact on public transportation and agreed to participate in funding mechanisms to assure adequate transit service to its project." *Id.* at A-9.

The California Supreme Court denied BJEW's Petition for Review on April 29, 1992. This Petition followed.

REASONS THE PETITION SHOULD BE DENIED

I. THIS CASE PRESENTS NO ISSUES MERITING SUPREME COURT REVIEW; THE COURT OF APPEAL'S INTERPRETATION OF *NOLLAN* IS CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS

A. *Nollan* Is Not A "Regulatory Takings" Case

BJEW insists that *Nollan* is a "regulatory takings" case, but the *Nollan* opinion does not support that assertion. *Nollan* involved the development of beachfront property. As a condition of their construction permit, the California Coastal Commission had required the Nollans to *dedicate a lateral easement* so that the public could gain access to public beaches near the Nollan's property.

Thus, *Nollan* is clearly a "possessory takings" case. Although the government in Nollan was not taking property outright, it was effectively taking the property through the permit condition. The Court likened *Nollan* to the *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), line of cases, explaining as follows:

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would continue to be developed with office space in the future. *See* Exh. 23 (Appendix A hereto).

> We think a "*permanent physical occupation* has occurred [for purposes of the *Loretto* rule] where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.
>
> * * *
>
> Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether *requiring it to be conveyed as a condition for issuing a land-use permit* alters the outcome.

483 U.S. at 832, 834.

This Court held that such a permit condition would be constitutional only if it substantially advances a legitimate governmental interest and does not deny the landowner economically viable use of his land. *Id.*, citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). This Court found *no nexus* between the permit condition and the justification for the burden on the property owner; thus, the court found an unconstitutional taking without having to discuss whether the condition denied the Nollans economically viable use of their property. 483 U.S. at 838-39.

The majority in *Nollan* cautioned that the "substantial" criterion was most relevant to cases in which the government was attempting to appropriate physical access:

> We are inclined to be particularly careful about the adjective *where the actual conveyance of property* is made a condition to the lifting of a land-use restriction since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

483 U.S. at 841.

In *Yee v. City of Escondido*, 60 U.S.L.W. 4301, 4302 (U.S. April 1, 1992), this Court explained that in "possessory takings" cases, such as *Loretto, supra*, "the government *authorizes a physical occupation of property* (or actually takes title) . . . . " Under such cases, the Takings Clause usually requires compensation.

Shortly thereafter, in *Lucas v. South Carolina Coastal Council*, 60 U.S.L.W. 4842 (U.S. June 29, 1992), this Court refined the "possessory takings" analysis, in which compensation is available "without case-specific inquiry into the public interest advanced in support of the restraint." *Id.* at 4845. In addition to the compelled physical invasion, this Court found "categorical treatment appropriate . . . where regulation denies all economically beneficial or productive use of land." This Court reasoned that such regulations "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 4846. The Court cited *Nollan* as representative of this class of cases. *Id.* at 4845.

On the other hand, in "regulatory takings" cases, "the government merely regulates the *use* of property." *Yee, supra*, 60 U.S.L.W. at 4302. In *Yee*, involving a local rent control ordinance affecting mobile home park

owners, this Court found no compelled physical invasion of land. The mobile home park owners voluntarily rented their land to the mobile home owners and were not compelled to continue to do so. *Id.* at 4303.[12] *See also Pennell v. City of San Jose*, 485 U.S. 1 (1988) (local rent control ordinance allowing consideration of hardship to a tenant when determining whether to approve rent increases); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) (requirement that employers withdrawing from pension plan pay additional amount corresponding to employers' proportionate share of plan's unfunded vested benefits); *Penn Central Transportation Co. v. New York City*, 483 U.S. 104 (1978) (landmarks preservation law regulating use of airspace over Grand Central Station). In such "regulatory takings" cases, courts conduct "ad hoc factual inquiries into the circumstances of each particular case" to determine whether a taking has occurred. *Connolly, supra*, 475 U.S. at 224.

B. *Nollan* Does Not Apply To Fee Exactions

In *Commercial Builders, supra*, the Ninth Circuit recognized that *Nollan* was a species of "possessory takings" cases. *Commercial Builders* upheld the constitutionality of

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[12] BJEW would label *Nollan* a regulatory takings case, claiming that the Nollans could have chosen not to take advantage of the benefits of their permit, obviating the compelled exaction of the easement. Pet. at 10-11. However, such an argument could apply to any exaction. The essence of the *Yee* distinction is between a compelled *physical occupation* of property and regulation of the *use* of the property. In the instant case, the exaction of the TIDF involves no physical invasion of land at all.

a Sacramento, California ordinance that conditioned certain types of nonresidential building permits upon payment of a fee. The fee was designed to offset the burdens on the supply of housing stock caused by low-income workers who moved to the city to fill jobs created by the projects.[13] Plaintiffs argued that a *Nollan* "heightened scrutiny" test applied to any condition on development, but did not convince the court:

> [W]e are not persuaded that *Nollan* materially changes the level of scrutiny we must apply to this Ordinance. The *Nollan* Court specifically stated that it did not have to decide "how close a 'fit' between the condition and the burden is required," because it found that the regulation in question "d[id] not meet even the most untailored standards." 483 U.S. at 838, 107 S.Ct. at 3149. . . . Other circuits have considered the constitutionality of ordinances that placed burdens on land use after *Nollan*. *None have interpreted that case as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land.* [Citations.]

941 F.2d at 874.

Plaintiffs in *Commercial Builders* also argued that the fee resembled a physical appropriation of property and was thus a taking *per se*. The court, however, reasoned that a "purely financial exaction . . . will not constitute a taking if it is made for the purpose of paying a social cost

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[13] The fees imposed on developers are paid into a fund to assist in the financing of low-income housing. *Id.* at 873.

that is reasonably related to the activity against which the fee is assessed." 941 F.2d at 876.[14]

In concluding that the nexus between a fee and the activity the fee underwrites may be a relatively loose one, the *Commercial Builders* court relied on this Court's decision in *United States v. Sperry Corp.*, 493 U.S. 52 (1989), reversing the only federal circuit court which had struck down a user fee as an unconstitutional taking.

Sperry upheld the exaction of a percentage of any award made by the Iran-United States Claims Tribunal to cover the costs incurred by the Tribunal. This Court unanimously rejected Sperry's contention that the monetary deduction for use of the Iran Tribunal was "akin to a 'permanent occupation' of its property and thus [was] a per se taking":

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[14] By analogy, there would be no *federal* constitutional prohibition on the City *taxing* developers of new office space to raise revenue to pay for transit, and the tax need not be related to the problem its proceeds would address. *See, e.g., Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974), in which a unanimous Court upheld a 20 percent gross receipts tax imposed on parking lot operators to raise revenue because of traffic-related problems caused by the operations. The Court "refused either to undertake the task of passing on the 'reasonableness' of a tax that otherwise is within the power of . . . state legislative authorities, or to hold that a tax is unconstitutional because it renders a business unprofitable." *Id.* at 373. Instead, the Court recognized that the amount of the tax is a legislative prerogative and will only be struck down if it is so arbitrary as to become confiscatory. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 627 & n.17 (1981). Because of Article XIII A of the California Constitution that limits special purpose taxes, the TIDF was carefully written to pass muster as a fee. However, for this Court's purposes, it makes little sense to scrutinize a fee that would not be subject to review were it a tax.

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. *Unlike real or personal property, money is fungible.* No special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately. If the deduction in this case was a physical occupation requiring just compensation, so would be any fee for services . . . .

493 U.S. at 62 n.9

Other courts have declined to apply the *Nollan* test in economic regulatory settings. For example, relying on *Sperry*, the court in *Atlas Corp. v. United States*, 895 F.2d 745, 756-58 (Fed.Cir. 1990), *cert. denied*, 111 S.Ct. 46 (1990), rejected the claim of a producer of uranium and thorium that federally mandated cleanup costs upon termination of its license effected a taking. The court ruled in this way despite the company's allegations that the amount of money it would be required to spend was greater than the value of the mill.[15]

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[15] *See also Colorado Springs Production Credit Ass'n v. Farm Credit Admin.*, 1992 WL 142068 (D.C. Cir. June 26, 1992) (federal statutory requirement that production credit associations make one-time purchase of stock from Farm Credit System Financial Assistance Corp. to avert financial crisis in Farm Credit System not a taking); *Meier v. Anderson*, 692 F.Supp. 546, 554 (E.D. Pa. 1988) (surcharge on health care providers to finance fund to compensate malpractice victims not a taking); *Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988) (sanctions against Libya resulting in termination of petroleum engineers' employment contracts with Libyan oil companies not a taking).

Legal scholars also agree that the *Nollan* analysis should be limited to possessory takings cases. Pet. at A-5. For example, one commentator concludes that *Nollan* is inapplicable to fee exactions such as the TIDF:

> The Court's concern with "extortion" and lengthy citation of state court development exaction cases raise the question whether, in another instance, the Court would strike down, for example, a *linkage or impact fee requirement imposed on commercial developers*. However, the *Nollan* opinion, with its solicitude for the right to build a private residence on private property, *would not support such a holding*. On the contrary, the majority suggests in closing that a *Nollan nexus requirement would be limited to permits conditioned on transfer of an interest in real property* . . . .

Lawrence, *Means, Motives and Takings: The Nexus Test of Nollan v. California Coastal Commission*, 12 Harv. Envtl. L.Rev. 231, 261, 262-63 (1988). Other commentators concur:

> [W]here the development condition poses no threat to *title* or *physical occupation* – such as payment of an impact fee or monetary exaction – there is no rationale for the reviewing court to resort to heightened scrutiny in a taking claim and the test for remoteness reduces to a substantive due process inquiry of rational basis analysis.

Freilich & Chinn, *Finetuning the Taking Equation: Applying it to Development Exactions, Part I*, 40 Land Use Law & Zoning 3, 8 (Feb. 1988) (emphasis in original).

BJEW asks this Court to decide an issue that does not merit its review. Case law and commentary uniformly

support the decision of the Court of Appeal that *Nollan* does not govern this case.[16] The Petition should be denied.

II. ONCE A DEVELOPMENT FEE ORDINANCE OF GENERAL APPLICATION HAS BEEN UPHELD TO A CATEGORY OF DEVELOPMENTS, NEITHER *NOLLAN* NOR ANY OTHER DECISION OF THIS COURT REQUIRES A MUNICIPALITY THEREAFTER TO DEMONSTRATE THAT THE AMOUNT OF THE FEE IMPOSED BY THE ORDINANCE IS TAILORED TO EACH DEVELOPMENT SUBJECT TO THE ORDINANCE

Despite the fact that the constitutionality of the TIDF Ordinance has been upheld (*Russ Bldg. I*), BJEW insists that the City, years after the project has been approved and constructed, must newly demonstrate that the TIDF is tailored to the transit problems caused by Levi's Plaza.[17] If BJEW prevails, each development subject to the

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[16] A close examination of *Russ Bldg. I*, however, reveals that the TIDF Ordinance would withstand a *Nollan* "heightened scrutiny" test. The *Russ Bldg. I* court found that the TIDF Ordinance was not a "special tax" under Article XIII A, section 4, of the California Constitution. A "special tax" is defined as a fee or exaction that exceeds "the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes." Cal. Gov't Code § 50076. Thus, as a matter of law, a precise nexus has been established between the amount of the TIDF and the impact on public transit of office construction in the downtown area of San Francisco.

[17] BJEW claims that the TIDF Ordinance has been invalidly *applied* to its development project (*see* A.A. 4:2-7). Although BJEW consistently has characterized this case as an "as applied" takings case, BJEW has not claimed that the City is applying the TIDF Ordinance incorrectly or in a different manner than as

Ordinance would require judicial reexamination of the reasonableness of the TIDF, even though a court has approved general assumptions underlying the Ordinance and has found a direct relationship between the fee and other properties in the class of developments included within the scope of the Ordinance.

Nollan concerned an action by the California Coastal Commission approving a development permit for a particular project. Municipal ordinances, on the other hand, by their very nature operate generally and have an obligatory force on the community. *See* 5 McQuillin, *Municipal Corporations* § 15.11 (3d ed. 1989). It is fundamental that under its police power, the City has the authority to adopt regulatory ordinances providing they have "a real and substantial relation" to the public welfare interests they are enacted to protect. *See Mugler v. Kansas*, 123 U.S. 623, 661 (1887). The *Russ Bldg. I* court acknowledged that a development fee exaction "is one of the most common subjects of local police power regulation." 199 Cal.App.3d at 1504. However, once a court has determined that such an ordinance advances a legitimate state interest, there may not be further attack on the application of the ordinance to every property subject to the ordinance.

In *Associated Home Builders Etc. v. City of Walnut Creek*, 4 Cal.3d 633, 637-40, 94 Cal.Rptr. 630, 484 P.2d 606 (1971), the California Supreme Court affirmed this principle. The case involved a requirement that developers, as a condition of subdivision development, make a dedication of land for park or recreational purposes or pay an in-lieu

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applied against other property owners. Rather, BJEW contends that the TIDF should not be imposed at all unless the City can show that the fee is tailored to Levi's Plaza.

fee. The plaintiffs argued that there must be a nexus shown between the need generated by the individual development and the dedication requirement in order for a particular dedication to withstand constitutional scrutiny. The Court disagreed:

> We see no persuasive reasons in the face of these urgent needs caused by present and anticipated future population growth on the one hand and the disappearance of open land on the other to hold that a statute requiring the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider upon whom an exaction has been imposed will, solely by the development of his subdivision, increase the need for recreational facilities to such an extent that additional land for such facilities will be required.

Id. at 639-40.[18]

The notion that a new nexus analysis is unnecessary once the validity of the underlying ordinance has been established is consistent with the decision in *U.S. v. Sperry Corp., supra*. Sperry argued that the charge for use of the Claims Tribunal could not be upheld as a valid user fee because there was no showing that the amount of the deduction approximated the cost of the Tribunal or bore any relationship to the value of the Tribunal's services to Sperry. Giving deference to the legislative findings that the purpose of the fee was to reimburse the United States for costs associated with the Tribunal, the Court held that

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[18] For a post-*Nollan* treatment of this same issue in another jurisdiction with the same result, *see Weingarten v. Town of Lewisboro*, 144 Misc.2d 849, 857-58, 542 N.Y.S.2d 1012 (1989), *aff'd*, 160 A.D.2d 668, 559 N.Y.S.2d 807, *appeal dismissed*, 76 N.Y.2d 934, 563 N.Y.S.2d 60, 564 N.E.2d 670 (1990), *order modified*, 77 N.Y.2d 926, 569 N.Y.S.2d 599 (1991).

the *burden was on Sperry to prove the lack of a nexus*. 493 U.S. at 60.

In *Russ Bldg. I*, the court found that the TIDF "is directly tied to the increase in ridership that this construction will possibly generate" and "limited to the estimated costs involved to serve the increased ridership." 199 Cal.App.3d at 1505. The court also held that there was substantial evidence to support the methodology used in determining the amount of the fee; in fact, the court pointed out that the actual costs imposed by the new developments would be "well above the $5-per-square-foot fee." *Id.* at 1511-16. To take BJEW's argument to its logical extreme would mean that the City would have to tailor the fee to each project before imposing the TIDF. That would effectively nullify the general force of the Ordinance, as well as the *stare decisis* effect of the *Russ Bldg. I* decision on the class of developments subject to the Ordinance.

Given the facial validity of the TIDF Ordinance, the only inquiry deemed relevant by the *Russ Bldg. II* court was whether the transit mitigation conditions contained in the pre-TIDF approval resolutions encompassed imposition of the TIDF. 44 Cal.3d at 845. In this case, that issue has been decided in the City's favor. *See* Pet. at A-7 – A-9.[19]

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[19] BJEW continues to take issue with the Court of Appeal's interpretation of Condition 5(c). Pet. at 20-22. However, under California law, the question whether Condition 5(c) contemplated the payment of the TIDF is a legal issue involving conflicting extrinsic evidence; thus, any reasonable construction by the lower court must be upheld. 9 Witkin, *California Procedure*,

BJEW did not convince the trial court or the Court of Appeal that the problems posed by Levi's Plaza on public transit differed in any material respect from the plaintiffs in *Russ Bldg. II.* Nor did BJEW prove that the TIDF as applied to Levi's Plaza was in any way arbitrary or unreasonable. The Court of Appeal correctly affirmed the decision of the trial court.

III. EVEN IF IT WERE NECESSARY TO UNDERTAKE A NEXUS ANALYSIS, *CONNOLLY* AND *SPERRY/COMMERCIAL BUILDERS* PROVIDE THE PROPER GUIDANCE

In *Keystone Coal Assoc. v. DeBenedictis,* 480 U.S. 470, 494-95 (1987), this Court reaffirmed its holding in *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264 (1981), that in analyzing whether a taking has occurred because of the impact of government action on a specific piece of property, courts should apply the three-part analysis discussed in *Connolly v. Pension Benefit Guaranty Corp., supra.*[20]

"Appeal" §§ 292, 293 (3d ed. 1985). Further, the question whether the transit problems caused by Levi's Plaza were substantially similar to those motivating passage of the TIDF Ordinance involved consideration of conflicting evidence by the trial court and was therefore governed on review by the substantial evidence test. *Id.* § 278, p. 289. In any event, none of these issues present a federal question meriting this Court's review. *See* Sup. Ct. R. 10.1.

[20] The court contrasted this test with the test to be applied in a purely facial challenge to a statute: "A statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land." 480 U.S. at 495; *see also Lucas v. South Carolina Coastal Council, supra,* 60 U.S.L.W. at 4845.

In *Connolly*, this Court identified three factors to be considered in determining whether a regulatory taking has occurred: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action. 475 U.S. at 224-25.

Applied here, this analysis demonstrates the correctness of the result in this case. BJEW has never claimed that imposition of the TIDF caused any undue economic impact on the joint venture or interfered with its investment-backed expectations *See, e.g.*, Complaint, AA pp. 1-5. Further, BJEW neither alleged nor submitted evidence that it has been denied any economically viable use of its land. AA 123 13-15.

As to the character of the government action, the initial inquiry is whether there has been an appropriation of assets for the government's own use. 475 U.S. at 225. The *Connolly* Court declared that when funds are used to support a "public program that adjusts the benefits and burdens of economic life to promote the common good," there is no taking. *Id.* Here, the City imposed the TIDF to remedy the burden on public transit caused by BJEW's project, not to enlarge the City's coffers or finance unrelated public projects. *See* AA 119:24-121:6, 122:25-123:3. Further, BJEW is not being singled out to bear the burden of a broader problem not of its own making. *See Armstrong v. U.S.*, 364 U.S. 40, 49 (1960); *Nollan, supra*, 483 U.S. at 835 n.4. Indeed, the *Nollan* Court agreed that the Coastal Commission could have denied the Nollans the right to build their permit outright "if their new house (alone, *or by reason of the cumulative impact produced in*

conjunction with other construction)" would impede the governmental purposes. *Id.* at 835.

BJEW's claims that the fee should *exclusively* address the transit problems caused by Levi's Plaza. Pet. at 22. However, such a "precise fit" is not required under the law. As the Ninth Circuit emphasized in *Commercial Builders, supra,* 941 F.2d at 875, "*Nollan* does *not* stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is *directly responsible* for the social ill in question." Rather, the financial exaction will be upheld "if it is made for the purpose of paying a social cost *that is reasonably related* to the activity against which the fee is assessed." 941 F.2d at 876.

This analysis is consistent with *Sperry,* which holds that the amount of the fee need not "be *precisely calibrated* to the use that a party makes of government services." On the contrary, the fee need only be " 'a *fair approximation* of the cost of benefits supplied.' " *Id.*, quoting *Massachusetts v. United States,* 435 U.S. 444, 463 n.19 (1978). Indeed, the Court suggested that Sperry might be required to pay a charge for mere availability of the service even if it had not actually used the service. 493 U.S. at 63.

The trial court in this case found the City's transit system to be integrated, so that the incremental demand imposed on the system attributable to the project could not be confined to the particular section of the City where the project was located:

> The City and County's transit system is integrated. Therefore, the impacts of increased

> demand are not limited to the points of initiation or destination. No evidence supports the claim that the Planning Commission condition contemplated that the City and County would create new bus routes confined to the northern waterfront area to respond to increased demand in that area; rather, the EIR proposed that headways be reduced on existing routes during peak hours (15/42 and 32 lines, which pass through the financial district and other parts of the City). Thus, in order to "assure adequate transit service to" Levi's Plaza, BJEW was on notice that (1) [the City] would have to add more buses to reduce headways on existing transit lines into the area and (2) that doing so would directly benefit other areas of the City that those lines serviced.

AA 120:19-121:6.

In such an integrated public transit system, it is obviously infeasible to restrict the transit benefits afforded by the TIDF to Levi's Plaza, as BJEW appears to suggest. Through use of the fee to mitigate the problems addressed in the EIR (*i.e.*, reduction of headways on the 15, 42 and 32 lines during peak-period hours), employees of Levi's Plaza *directly benefit*, as do workers in other office buildings serviced by those lines. BJEW's contention that the fee only "indirectly" benefits Levi's Plaza does not square with the dynamics of a public transit system and is not supported by the record in this case.

At the time Levi's Plaza was approved, BJEW committed to paying for the impact on public transit it acknowledged its development would engender – even though no one, including BJEW, knew what form the

funding mechanism would take. Now, having built, operated, and profited from a popular office complex for many years – a complex that the City's transit system has continued to serve – BJEW balks at the payment of the TIDF, claiming the City should have specified the funding mechanism at the time the project was approved. Fundamental fairness and justice impose responsibility for impacts generated by a particular project on the developer of that project. *Connolly, supra,* 475 U.S. at 227. In direct contravention of this fundamental principle of takings analysis, BJEW asks that the public shoulder the financial burden imposed by Levi's Plaza on public transit.

Under a *Connolly* analysis, and under the principles set forth in *Sperry* and *Commercial Builders,* the Court of Appeal correctly upheld application of the TIDF to BJEW. BJEW's position has no basis in law or in fact, and its Petition should be denied.

CONCLUSION

No solid ground exists for review of this case by this Court. Any "heightened scrutiny" test in *Nollan* simply has no application to economic regulatory cases, especially those involving fees. Nor does the law require a legislatively approved fee exaction on developers to be tailored to each project. However, even if a further nexus

analysis is required, the TIDF solidly withstands any such scrutiny as applied to BJEW.

Dated: August 13, 1992

Respectfully submitted,

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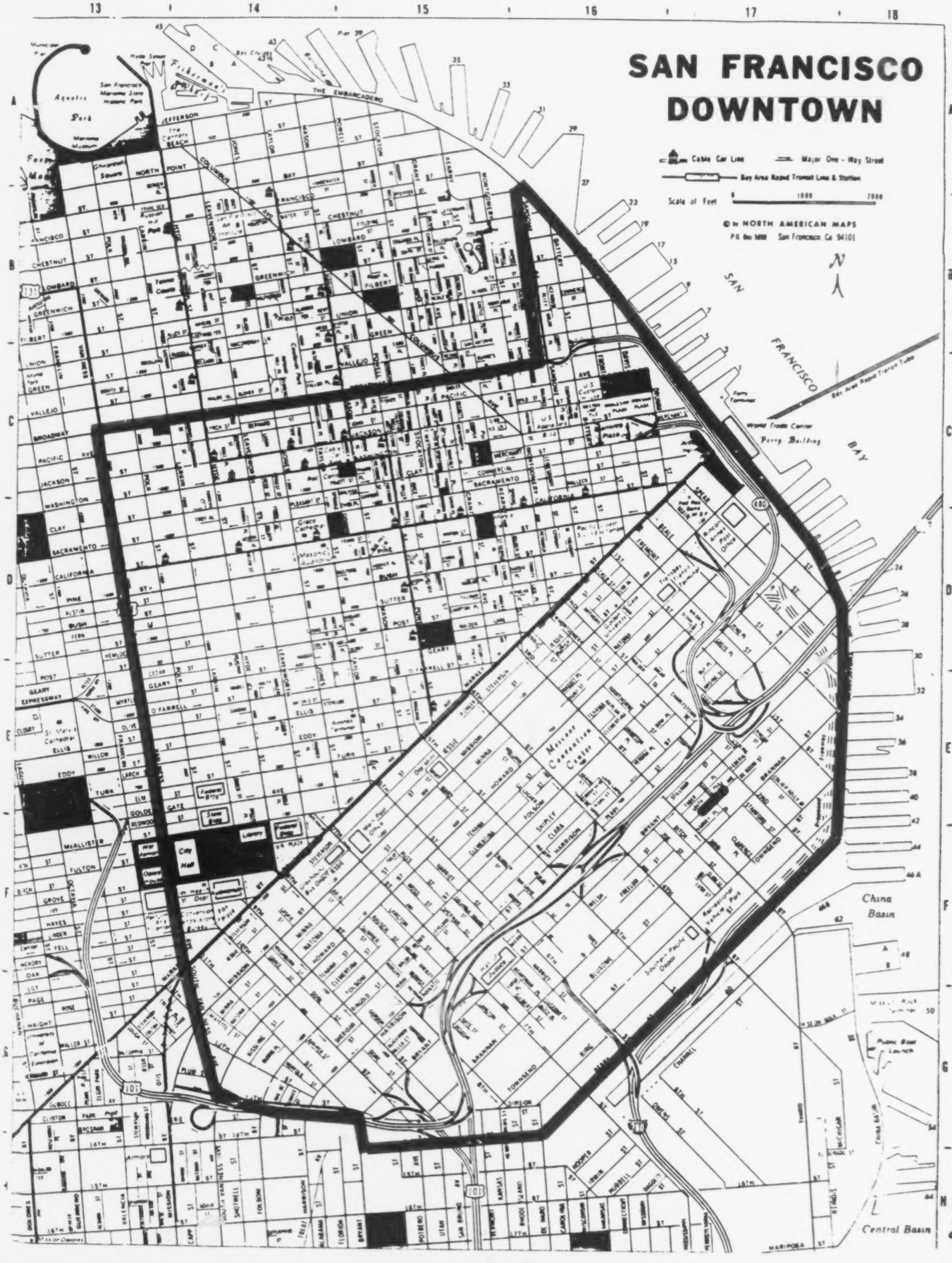

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Ex. 23